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In the Supreme Court of the United States

JAMES M. FEJES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Lacey Act, 16 U.S.C. 3371 *et seq.*, makes it unlawful to, among other things, sell in interstate commerce wildlife taken in violation of state law. 16 U.S.C. 3372(a)(2)(A). The Lacey Act imposes felony liability if the defendant knowingly sells wildlife with a market value in excess of $350, knowing that the wildlife was taken in violation of law. 16 U.S.C. 3373(d)(1)(B). A "sale" of wildlife is defined to include the provision of guiding services for hire, for the illegal taking of wildlife. 16 U.S.C. 3372(c)(1). The questions presented are:

1. Whether a guide who provides services for the illegal taking of wildlife is subject to felony liability under the Lacey Act, where the financial arrangements for the guiding services were made before the illegal taking of wildlife.

2. Whether the market value of wildlife sold in violation of the Lacey Act may be determined by reference to the price paid for guiding services, where the provision of guiding services is the "sale" of wildlife that supports felony liability.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 232 F.3d 696.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2000. A petition for rehearing was denied on January 10, 2001 (Pet. App. 16). The petition for a writ of certiorari was filed on April 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Lacey Act, ch. 553, 31 Stat. 187 (16 U.S.C. 3371 *et seq.*), as amended in 1981 (Pub. L. No. 97-79, 95 Stat. 1073), makes it unlawful for any person to, among other things, "import, export, transport, sell, receive, acquire, or purchase" in interstate or foreign commerce any wildlife "taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. 3372(a)(2). The Act authorizes civil penalties (16 U.S.C. 3373(a)), as well as misdemeanor liability (16 U.S.C. 3373(d)(2)) or felony liability (16 U.S.C. 3373(d)(1)) for individuals with greater degrees of culpability. The Act's felony provision states in pertinent part:

> Any person who * * * violates any provision of this chapter * * * by knowingly engaging in conduct that involves the sale or purchase of * * * wildlife * * * with a market value in excess of $350, knowing that the * * * wildlife * * * [was] taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both.

16 U.S.C. 3373(d)(1).

In 1988, Congress amended the Lacey Act in response to *United States* v. *Stenberg*, 803 F.2d 422, 437 (1986), in which the Ninth Circuit held that the provision of guiding services for the illegal taking of wildlife was not a "sale" of wildlife prohibited by the Act. In its amendment, Congress defined the term "sale" to include offering or providing guiding or other services for the illegal taking of wildlife. See Act of

Nov. 14, 1988, Pub. L. No. 100-653, § 101, 102 Stat. 3825 (16 U.S.C. 3372(c)).

2. Petitioner is a registered hunting guide in Alaska. Pet. App. 3. In August 1996, petitioner took two clients, Jon McNeely and Michael Doyle, on a guided caribou hunt in Alaska. McNeely, who had hired a cameraman to film the hunt, promised petitioner a 30-second advertising spot on McNeely's syndicated "outdoorsman" television show, valued at approximately $2750, in exchange for petitioner's services. Doyle paid petitioner $3500, in advance. *Ibid.*

At the beginning of the hunt, petitioner flew McNeely, Doyle, McNeely's cameraman, and Blaine Morgan, a licensed guide employed by petitioner, to a temporary camp. Pet. App. 3. Petitioner left the camp and Morgan led the party on a hunt for caribou. *Ibid.* Doyle shot and killed a caribou, in violation of Alaska's restriction on same-day airborne hunting.* *Ibid.* Petitioner and two other pilots flew the party, along with the meat and antlers from Doyle's caribou, back to petitioner's base camp. *Id.* at 4.

Two days later, petitioner guided McNeely on another same-day airborne caribou hunt. McNeely shot and killed a caribou. Petitioner testified at trial that he

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* At the time of the events at issue in this case, the Alaska Administrative Code provided that no person who has been airborne "may * * * take or assist in taking a big game animal until after 3:00 a.m. following the day in which the flying occurred." Alaska Admin. Code tit. 5, § 92.085(8) (1996). Alaska law also prohibited the taking of wildlife except as permitted by Alaska statutes or regulations. Alaska Stat. § 16.05.920(a) (Michie 1996). In addition, Alaska law prohibited licensed hunting guides from aiding or permitting the commission of a violation of Alaska hunting regulations "without attempting to prevent it, short of using force; and reporting the violation." *Id.* § 08.54.720(a)(8)(B).

only expected the cameraman to film the caribou, and did not expect McNeely to shoot his gun The cameraman, however, testified that petitioner had said that morning that "we're going out to kill a caribou here today." Pet. App. 4. After the kill, petitioner congratulated McNeely and posed for photographs with McNeely and the dead caribou. *Ibid.* Petitioner and his employees then flew the hunting party and the caribou meat back to petitioner's base camp. *Ibid.*

No one reported the illegal hunts to the Alaska authorities. Pet. App. 4. Doyle and McNeely took caribou parts home with them to other States. *Ibid.* The hunts were featured on McNeely's television show, which also carried an advertisement for petitioner's guiding operation. *Id.* at 4-5.

3. In October 1998, petitioner, McNeely, Morgan, and a pilot who had assisted with the August 1996 hunt, were indicted in the United States District Court for the District of Alaska on charges of conspiracy and violations of the Lacey Act. Doyle was charged in a separate indictment that was transferred to Minnesota. All the defendants except petitioner pleaded guilty. See Pet. App. 5. A jury found petitioner guilty of conspiracy and felony violations of the Lacey Act. *Ibid.* The district court sentenced petitioner to a prison term of six months and one day, followed by two years' supervised release. The court also ordered petitioner to pay a $5000 fine. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-15. The court first rejected petitioner's contention that the Lacey Act's felony provision does not reach the provision of guiding services unless the guiding services are sold after an illegal taking of wildlife. The plain language of the Lacey Act, the court explained, defines a "sale" of wildlife to include "provid[ing]" guiding serv-

ices, 16 U.S.C. 3372(c)(1), "not merely making financial arrangements for such services." Pet. App. 8. Thus, the provision of guiding services for an illegal taking of wildlife constitutes a prohibited sale of wildlife. The court of appeals noted that its reasoning was consistent with the legislative history of the 1988 amendment to the Lacey Act. *Ibid.* The court further observed that petitioner's reading of the Lacey Act would lead to the absurd result of preventing prosecution of a guide who learns, after receiving full payment, that a customer intends to take game illegally, and nevertheless provides guiding services. *Id.* at 8-9.

The court of appeals next addressed petitioner's challenges to the district court's jury instructions. The court of appeals rejected, as factually incorrect, petitioner's claim that the district court instructed the jury that it could find petitioner guilty of a felony merely for transporting a caribou. Pet. App. 9-11; see 16 U.S.C. 3373(d)(1)(B). The court of appeals also held that the district court did not err by failing to instruct the jury that it had to agree unanimously on the method by which petitioner violated the Lacey Act. The court of appeals explained that petitioner did not request such an instruction, and the facts of his case were not so complex as to require a special instruction. Pet. App. 11. Nor, the court of appeals held, was the district court required to instruct the jury that Alaska allows the transportation of illegally taken game for the purpose of surrendering the game to state authorities. The court of appeals reasoned that petitioner's felony conviction rested on the jury's well-supported finding that petitioner sold illegally taken caribou in interstate commerce, whether or not petitioner also transported the caribou. *Id.* at 11-13.

The court of appeals further concluded that the district court was not required to instruct the jury on the lesser-included Lacey Act misdemeanor offense. The court of appeals noted that it was undisputed at trial that petitioner sold his guiding services for more than $350, the threshold value of wildlife needed to support a felony conviction. Accordingly, the jury could not reasonably have found petitioner guilty only of a misdemeanor violation of the Lacey Act, without finding a felony violation. Pet. App. 14-15. In that regard, the court of appeals rejected petitioner's argument that the district court erred by instructing the jury that it could use the price paid for petitioner's guiding services to determine the market value of the wildlife illegally taken by petitioner's party. Quoting *United States* v. *Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993), the court of appeals held that "where the commodity sold is the opportunity to hunt game with the assistance of a guide, the value of an animal 'sold' for purposes of § 3372(c) 'is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt.'" Pet. App. 15.

ARGUMENT

1. Invoking *United States* v. *Romano*, 137 F.3d 677 (1st Cir. 1998), petitioner asserts that he could not be convicted of a Lacey Act felony violation unless the jury found that petitioner knew of the illegal taking of wildlife before selling his guiding services. Pet. 5-9. Petitioner concedes that the 1988 amendment to the Lacey Act, 16 U.S.C. 3372(c)(1), made unlawful the provision of guiding services for the prospective illegal taking of game, but he maintains that the felony provision of Section 3373 "still requires that the [guide]

know that the game had already been taken illegally" when he consummates the financial arrangements for his provision of services. Pet. 7, 9. Petitioner's construction of the Lacey Act is incorrect.

The Lacey Act provides for felony liability if a defendant "knowingly" engages in conduct that involves the "sale or purchase of * * * wildlife * * * knowing that the * * * wildlife * * * [was] taken, possessed, transported, or sold in violation of * * * any underlying law, treaty or regulation." 16 U.S.C. 3373(d)(1). The pertinent question, as the court of appeals observed, is when the sale of wildlife is complete in a situation in which the sale of wildlife consists of providing guiding services described in Section 3372(c)(1). Certainly, the guide is subject to criminal liability where, as here, he provides guiding services before, during, and after an illegal taking of game. Pet. App. 7-8.

Section 3372(c)(1) states that it is a "sale of * * * wildlife in violation of this chapter for a person for money or other consideration to *offer or provide* * * * guiding, outfitting, or other services * * * for the illegal taking [of wildlife]." 16 U.S.C. 3372(c)(1) (emphasis added); see Pet. App. 8. Thus, a "sale" of wildlife includes the provision, as well as the offering, of guiding services. That language makes clear that the "sale" of wildlife does not terminate upon conclusion of financial arrangements for or guiding services, but rather continues throughout the provision of those services for which the guide is paid.

In this case, petitioner (or his employees) took Doyle and McNeely to his temporary camp and led them to the caribou. Pet. App. 4. After Doyle and McNeely shot their caribou, the caribou were field-dressed and transported back to the base camp by petitioner's

employees as part of the guiding services petitioner was compensated to perform. *Id.* at 4-5. Petitioner congratulated McNeely on his kill and posed for a photograph with McNeely's dead caribou. *Id.* at 4. Because petitioner provided guiding services not just before and during the hunts, but also after the time when he became aware that the animals "were taken * * * in violation of * * * [state] law" (16 U.S.C. 3373(d)(1)), he is clearly within the reach of the Lacey Act's felony provision.

The legislative history of the Lacey Act is consistent with the plain language of the statute. Both the Senate Report and the House Report on the 1988 amendment that addressed guiding services state that the amendment was intended to make "the providing of guiding services used in the illegal taking of wildlife * * * subject to the enforcement provisions of the Lacey Act." S. Rep. No. 563, 100th Cong., 2d Sess. 5 (1988); see H.R. Rep. No. 732, 100th Cong., 2d Sess. 12 (1988) (using substantially similar language). As the Senate Report explained,

> [g]uiding, outfitting, and transportation services related to hunting have become a substantial commercial enterprise. Some individuals providing these services will knowingly violate the law in order to please the customer and become well known. The very nature of the enterprise can have a significant impact on the resource.

S. Rep. No. 563, *supra*, at 10. It is clear from this legislative history that when Congress defined the "sale" of wildlife to include the provision of guiding services, 16 U.S.C. 3372(c)(1)(A), it meant to reach guides who facilitate the illegal taking of game, whether they are paid before the kill or after it. See generally *Stone* v.

INS, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

Contrary to petitioner's contention, the court of appeals' decision in this case does not conflict with the First Circuit's decision in *United States* v. *Romano*. The defendant in *Romano* was a hunter who, unbeknownst to his guides, secured a hunting permit in violation of state law. 137 F.3d at 678. The government prosecuted Romano under the Lacey Act's prohibition against "purchas[ing]" wildlife with knowledge that such wildlife was taken in violation of underlying law (16 U.S.C. 3373(d)(1)(B)), on the theory that Romano hired a guide for the prospective illegal taking of wildlife. See 137 F.3d at 681. The First Circuit determined that the knowledge requirement of the Lacey Act's felony provision—that is, the requirement that the accused engage in the conduct "knowing that the * * * wildlife * * * [was] taken, possessed, transported, or sold in violation of" law—was not satisfied because there had not been any unlawful taking of game when Romano obtained the services. *Id.* at 681-682.

As the Ninth Circuit explained, *Romano* involved the Lacey Act's prohibition on *obtaining* guiding services (16 U.S.C. 3372(c)(2)), not the prohibition on *providing* guiding services (16 U.S.C. 3372(c)(1)) that is at issue in this case. The *Romano* court held that "obtain[ing]" guiding services "for money or other consideration," 16 U.S.C. 3372(c)(2), does not continue throughout the provision of guiding services. 137 F.3d at 681-682. Section 3372(c)(1), however, expressly reaches both the offering and the provision of guiding services for hire. Thus, as the Ninth Circuit indicated (Pet. App. 9 n.4), this case does not implicate the First Circuit's holding

that one obtains guiding services only at the moment when such services are purchased.

2. Petitioner also challenges (Pet. 9-13) the court of appeals' endorsement of the district court's instruction on the definition of market value. The court of appeals correctly held that, for purposes of meeting the $350 threshold in Section 3373(d)(1)(B), the market value of the caribou taken by petitioner's party could be determined by reference to the price paid for petitioner's guiding services. See Pet. App. 15. The Ninth Circuit recognizes that, when the sale of wildlife consists solely of the direct sale of a carcass or parts, the market value of the wildlife is properly determined by establishing the market value of the carcass or parts. See, *e.g.*, *United States* v. *Senchenko*, 133 F.3d 1153, 1157 (9th Cir.) (value of bear parts), cert. denied, 525 U.S. 872 (1998). But when the sale of wildlife consists solely of providing services for an illegal taking, the courts of appeals have looked to the price paid for the guiding services. *United States* v. *Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993); *United States* v. *Todd*, 735 F.2d 146, 152 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985). As the Ninth Circuit explained in *Atkinson*, the "commodity being 'sold' is the opportunity to illegally hunt game with the assistance of a guide." 966 F.2d at 1273. In that circumstance, the value of an animal taken "bears little relation to the market price of its parts. Instead * * * its market value is best represented by the amount a hunter is willing to pay for the opportunity to participate in the hunt." *Ibid.*

Contrary to petitioner's reading of *Todd* (Pet. 11), the Fifth Circuit has not "reject[ed] the value of the hunt as a basis for finding a felony violation." In *Todd*, the Fifth Circuit reversed a guide's felony conviction for

violating the Lacey Act after finding that the guide was paid $600 by a hunter who did not kill wildlife, but only $250 by a hunter who did take wildlife illegally. 735 F.2d at 148, 152. At the same time, however, the Fifth Circuit held that when a professional guide offers his services to obtain wildlife illegally, "[t]he best indication of the value of the game 'sold' in this manner is the price of the hunt." *Id.* at 152. The Ninth Circuit relied on *Todd* when adopting the rule that the price of the hunt fixes the value of the wildlife taken by the hunter. *Atkinson*, 966 F.2d at 1273.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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